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No. 73-1038

# In the Supreme Court of the United States

OCTOBER TERM, 1973

APPALACHIAN POWER COMPANY, ET AL., PETITIONERS
*v.*
ENVIRONMENTAL PROTECTION AGENCY

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

## BRIEF FOR THE RESPONDENT IN OPPOSITION

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### OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-26a) is reported at 486 F.2d 427.

### JURISDICTION

The judgment of the court of appeals was entered on September 10, 1973. A timely petition for rehearing was denied on October 3, 1973 (Pet. App. 27a). The petition for a writ of certiorari was filed on January 2, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### STATUTES INVOLVED

Section 111 of the Clean Air Act, as added, 84 Stat. 1683, 42 U.S.C. 1857c-6, and Sections 101 and 102 of the



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National Environmental Policy Act of 1969, 83 Stat. 852, 853, 42 U.S.C. 4331 and 4332, are set forth in the appendix to the petition at pages 28a–38a.

## QUESTIONS PRESENTED

1. Whether the court of appeals properly concluded that "the record evidence supports the conclusion that [the Environmental Protection Agency's standards of performance for new fossil fuel-fired steam generators] are the result of reasoned decision-making."

2. Whether the Environmental Protection Agency is required to prepare and publish an environmental impact statement, pursuant to Section 102(2)(C) of the National Environmental Policy Act, 42 U.S.C. 4332(2)(C), prior to promulgating new source emission standards as required by Section 111 of the Clean Air Act, 42 U.S.C. 1857c–6.

## STATEMENT

Section 111 of the Clean Air Act, 42 U.S.C. 1857c–6, provides a system of regulation of emissions of air pollutants from "new stationary sources."[1] These new installations are to be operated, under the terms of

[1] The definitions in this Section provide (42 U.S.C. 1857c–6(a)):

"(2) The term 'new source' means any stationary source, the construction or modification of which is commenced after the publication of regulations (or, if earlier, proposed regulations) prescribing a standard of performance under this section which will be applicable to such source.

"(3) The term 'stationary source' means any building, structure, facility, or installation which emits or may emit any air pollutant."

this Section, in such a manner that their emissions of pollutants will not exceed "standards of performance" developed for and applied to defined categories[2] of these "sources" by the Environmental Protection Agency (EPA). The manner in which the EPA establishes these "standards of performance" and the timetable for their development are also specified.[3]

Congress defined "standards of performance" as follows (Section 111(a)(1)), 42 U.S.C. 1857c-6(a)(1)):

> The term "standard of performance" means a standard for emissions of air pollutants which

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[2] 42 U.S.C. 1857c-6(b)(2) provides: "The Administrator may distinguish among classes, types and sizes within categories of new sources for the purpose of establishing such standards."

[3] 42 U.S.C. 1857c-6(b)(1) provide: "(A) The Administrator shall, within 90 days after December 31, 1970 [the date of enactment of the Clean Air Amendments of 1970], publish (and from time to time thereafter shall revise), a list of categories of stationary sources. He shall include a category of sources in such list if he determines it may contribute significantly to air pollution which causes or contributes to the endangerment of public health or welfare.

"(B) Within 120 days after the inclusion of a category of stationary sources in a list under subparagraph (A), the Administrator shall propose regulations, establishing Federal standards of performance for new sources within such category. The Administrator shall afford interested persons an opportunity for written comment on such proposed regulations. After considering such comments, he shall promulgate, within 90 days after such publication, such standards with such modifications as he deems appropriate. The Administrator may, from time to time, revise such standards following the procedure required by this subsection for promulgation of such standards. Standards of performance or revisions thereof shall become effective upon promulgation."

> reflects the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction) the Administrator determines has been adequately demonstrated.

On August 17, 1971, the Administrator proposed new source performance standards for five categories of sources. 36 Fed. Reg. 15704, App. 2. After the prescribed period for public comment, the Administrator promulgated final standards which were effective upon publication (December 23, 1971). 36 Fed. Reg. 24876, App. 225. The petitioners instituted a proceeding in the court of appeals[4] to review the standards of performance for one of the categories of new sources, fossil fuel-fired steam generators. 40 C.F.R., Part 60, Subpart D (App. 230–233). The court of appeals upheld most of the standards against petitioners' contentions, finding that "the record evidence supports the conclusion that they are the result of reasoned decision-making" (Pet. App. 23a–24a), but remanded the case to the agency for additional consideration and explanation of certain aspects of these standards.[5]

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[4] Section 307(b)(1), 42 U.S.C. 1857h–5(b)(1), provides for initial review of these standards by the Court of Appeals for the District of Columbia Circuit.

[5] Specifically remanded for further consideration were the opacity standard for particulate matter (40 C.F.R. 60.42(b), App. 231) and the standard for sulfur dioxide (40 C.F.R. 60.43, App. 231) insofar as the record did not show that the Administrator had fully considered the significant solid waste disposal problem which, the record revealed, could emanate from application of the control technology relied on by the agency as a partial basis for the standard.

**ARGUMENT**

1. The court of appeals remanded the sulfur dioxide standards to EPA to consider further the environmental effects of disposing of the bypoduct which results from the technology on which the standards were based. Petitioners nonetheless argue that this decision should now be reviewed by this Court because petitioners believe that there are additional flaws in the data supporting the standards (Pet. 15–20). The court of appeals found (Pet. App. 23a–24a):

> Reviewing the coal-fired steam generator standards promulgated for particulate matter, sulfur dioxide, and nitrogen oxides, see 40 C.F.R. § 60.40 *et seq.*, and subjecting them to the various tests and scopes of inquiry discussed above, we find that with but one exception the record evidence supports the conclusion that they are the result of reasoned decision-making. The evidence, including tests of prototype and full-scale control systems, considerations of available fuel supplies, literature sources, and documentation of manufacturer guarantees and expectations, convinces us that the systems proposed are adequately demonstrated, that cost has been taken into consideration, and that the emission standards are achievable. [Footnotes omitted.]

This reasoned conclusion of the court of appeals fully complied with this Court's directions in *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 415, 419, that the review of such administrative decisions should be a "thorough, probing, in-depth review," a "substantial inquiry" on the "whole record." And, in

any event, further review at the present interlocutory stage of the case would be unwarranted.

2. Petitioners urge as an additional ground for granting of the writ "the continuing controversy over the ambient air quality standards" (Pet. 20–23). The new source performance standards of Section 111 do not bear any direct relationship to the national ambient air quality standards of Section 109, 42 U.S.C. 1857c–4, which are to be implemented by plans adopted pursuant to Section 110, 42 U.S.C. 1857c–5. As petitioners acknowledge, "emission standards are based on a best technology requirement rather than the achievement of the ambient air standards" (Pet. 20–21). Of course the emission standards facilitate achieving and maintaining the national ambient air quality standards, but there is no quantitative relationship between the two types of standards. Hence, petitioners' argument regarding the national ambient air quality standard is irrelevant to their challenge here to the emission standards.[6]

3. The court of appeals correctly held that EPA was not required by the National Environmental Policy Act to file an environmental impact statement before adopting these standards. In *Portland Cement Association* v. *Ruckelshaus*, 486 F.2d 375 (C.A. D.C.), the court of appeals extensively examined this ques-

[6] The argument seems also to be at odds with petitioners' earlier acknowledgement of the purpose of the new source standards, "to place all new sources of pollution on an equal footing by assuring that they not be located on the basis of which states had the highest air quality and thus the most lenient emission limitations in their implementation plans" (Pet. 5; see also Pet. 5–6, n. 8).

tion and decided that, because Section 111 of the Clean Air Act "requires the functional equivalent of a NEPA impact statement," the procedures of NEPA need not be followed. 486 F.2d at 384. Notably, the remand of the sulfur dioxide standards in this case required EPA to consider and explain the "counter productive environmental effects of the system" which the court found had been inadequately explained in the standards (Pet. App. 25a).

Moreover, all the courts of appeals which have considered the question have held that EPA need not prepare environmental impact statements in connection with its regulatory activities. *Anaconda Company* v. *Ruckelshaus*, 482 F.2d 1301 (C.A. 10); *Appalachian Power Co.* v. *Environmental Protection Agency*, 477 F.2d 495 (C.A. 4); *Duquesne Light Co.* v. *Environmental Protection Agency*, 481 F.2d 1 (C.A. 3); *Getty Oil Co.* v. *Ruckelshaus*, 467 F.2d 349, 359 (C.A. 3), certiorari denied, 409 U.S. 1125; *Buckeye Power, Inc.* v. *Environmental Protection Agency*, 481 F.2d 162 (C.A. 6); *Environmental Defense Fund, Inc.* v. *Environmental Protection Agency*, 489 F.2d 1247 (C.A. D.C.); *International Harvester Company* v. *Ruckelshaus*, 478 F. 2d 615 (C.A. D.C.). No court of appeals has seen fit to hobble the actions of EPA, whose mission is protection of the environment, with procedures designed for giving other federal agencies sufficient pause for consideration of environmental factors prior to undertaking projects possibly damaging to the environment. As the

courts have held, EPA has its environmental mandate codified in its organic acts, including the Clean Air Act.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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